she wouldn't pay her doctor's bill to have her son's leg fixed, as a result of which he had to have it amputated, and she was worth millions. She went to a clinic to have it done, and she was recognized by the doctor, who wouldn't do it for nothing. She wouldn't pay and he wouldn't do it. She took him home, did it herself, with the result that the boy's leg was amputated. She was worth millions. So you can draw no such inferences from what people do by circumstance to prove the fact as to whether or not they have cash.

(2085) The Court: I dare say you will persuade the jury or try to that they ought to follow that line, but it hasn't impressed me and the motion in that respect is denied.

As to the two aspects that were left open, motions to strike, what was that section of the law, again, 41?

Mr. Fennelly: 41.

The Court: That provides that if the method of accounting employed by the taxpayer does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.

The motion to strike based on Section 41 is denied.

There was one other motion to strike, which I have forgotten, and that had to do with the question of this $400 for some garments.

Mr. Fennelly: $450.

Mr. MacMahon: Your Honor, may Mr. Christy handle that?

The Court: Yes.

Mr. MacMahon: That was one of his witnesses.

Mr. Christy: I believe Mr. Fennelly is referring to the sales slip in Government's Exhibit 323-A.

(2086) The Court: Let me take a look for a minute.

Yes?

Mr. Christy: Do you wish to see it, your Honor?

(Exhibit handed to the Court.)

The Court: Yes?

Mr. Christy: This is a sales slip, which is dated December 13, 1949. I refer to Mrs. Thal's testimony on page 1443 of the transcript. I asked her, "Do you also maintain ledger sheets for customers?" And she answered, "For charge customers."

I asked her was Mrs. Costello a charge customer, and she said no.

"Did she always pay cash? A. She always paid.

"Q. Well, was it cash? A. It would be cash or check."

Now, this exhibit is marked—this was an audit copy of the sales slip, and it is marked in the upper lefthand corner "Paid," which would seem to indicate that, since it was dated December 13, some almost three weeks before the end of the month, that it must have been paid in that time.

Mr. Fennelly: The witness Handelsman, who was a Government agent, testified having made a transcript of the accounts at Wilma Gowns, and on cross examination (2087) I showed him the sales ticket which is Government's Exhibit 323-A—

Mr. MacMahon: Your Honor, because of the sirens I am having difficulty. Could we suspend?

The Court: I think you had better suspend, because the competition is too much. That will go on for five minutes or more, so we will just recess.

(Short recess.)

Mr. Fennelly: The witness Handelsman, who was a revenue agent who was making an investigation, if you will recall, made a transcript of the Wilma Gowns account.

The Court: What page is that?

Mr. Fennelly: That is page 1462 of the record.

(A pause.)

The Court: Very well. All right, Mr. Fennelly.

Mr. Fennelly: There isn't anything on the account, admitted—I mean, the agent admitted that there was nothing on the exhibits and on his transcript to indicate when it was paid.

The Court: Well, the testimony was that you asked him to look at the transcript for the month of December '49 and he said there was nothing there that showed that.

Mr. Fennelly: That is right. Nothing in her (2088) bank account indicating a payment by check in '49. The item was sold on December 13th. And there is a notation here which looks like that was put on the ledger, right on this audited copy, and therefore not paid by cash, no proof that it was paid by cash (handing to Court).

The Court: The motion to strike is denied.

Mr. Fennelly: Could I ask your Honor to look at the record again in connection with this Philco item?

The Court: What page is that?

Mr. Fennelly: I will have to get that for you, but I can tell you I don't think there will be any dispute as to the state of the record. The record is that a Philco was installed in the Costello home. There is no proof by anyone whether it was a gift or how they got it; no one has testified at all on the subject. A man came in and testified as to a bill for installing

it, installation bill, and the man from the Philco Company testified that that was a—as to a list price, nothing in the record as to payment.

Mr. Christy: As to that, your Honor, there was testimony that the air-conditioner was installed in July 1949, giving the model number and serial number, and the man from Philco testified as to the list price of an air-conditioner at that time. And I would submit that (2089) taking this evidence in the light most favorable to the Government, which you can on a motion of this nature, that there is sufficient evidence to permit the jury to infer that they purchased the air-conditioner.

The Court: The motion to strike that is denied.

Mr. Fennelly: I find that this assessment for the year 1944 was not marked.

(To the Clerk) Perhaps you gave it a number, but I see no mark on it.

The Clerk: I marked three, EEE, FFF and GGG.

Mr. Fennelly: You should have marked four.

The Clerk: All right. This will be Defendant's Exhibit for identification HHH.

(Marked Defendant's Exhibit HHH for identification.)

The Court: Are you ready to proceed, Mr. Fennelly?

Mr. Fennelly: Yes, your Honor, in just one second. I have got to get a—

The Court: Well, all I wanted to know was, are you ready to proceed with testimony? Is it all right to call in the jury? You don't have any further motions?

(2090) Mr. Fennelly: No, your Honor, those are all the motions.

The Court: Very well. All right. Call in the jury. Or do you need a few more minutes, Mr. Fennelly?

Mr. Fennelly: No, your Honor.

The Court: Very well. Bring in the jury.

(Jury in the box.)

The Court: Good morning, ladies and gentlemen.

Mr. Fennelly: Mr. Sweeney, would you take the stand, please.

ALFRED E. SWEENEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Fennelly:

Q. Mr. Sweeney, what is your occupation? A. Senior public accountant.

Q. And did you at one time work for Price, Waterhouse Company? A. Yes, I did.

Q. Did you ever work for the FBI, or the Federal Bureau of Investigation? A. Yes; I was a special agent in the FBI for ten years, engaged mostly on accounting investigations.

Q. And you worked in this building, did you not? (2091) A. Yes, sir, for several years.

Q. And have you been offered as an expert by the United States Government to testify as to accounting matters? A. Yes, quite a few times.

Q. In cases in which the United States Government was a party? A. Correct.

Q. And in the accounting work that you did for the Federal Bureau of Investigation it involved, did it not, exam-

ining financial statements and accounting records to determine whether or not they were correct and accurate? A. It did.

Q. And did I retain you and your firm to aid me in the preparation of this case for defense? A. Yes, through the firm, through the firm I am employed by, I should say.

(Marked Defendant's Exhibits III and JJJ for identification.)

Q. And you have been in this courtroom throughout the trial and heard the testimony of all of the witnesses, have you not? A. Yes, sir.

Q. And you are familiar with the exhibits in this case? A. Yes, sir.

Q. Now, from the testimony and exhibits have you prepared a statement of the cash balance on hand, as claimed by the Government; on October 18, 1937 from the (2092) exhibits and the cash receipts and disbursements as shown by the exhibits and testimony from October 18, 1937 to December 31, 1945? A. Yes, sir.

Mr. MacMahon: Your Honor, I submit there should be a hypothetical question if there are any assumptions in this schedule.

The Court: He is asking him what he did, and I will allow it. He says he did prepare such a statement.

Q. I show you Defendant's Exhibit III and ask you whether or not that is the statement that you prepared? A. It is.

The Court: May I see it?

The Witness: Yes, sir (handing to the Court.)

The Court: Thank you.

Q. And can you from the exhibits in evidence and the testimony tell us the total receipts and disbursements of Mr. and Mrs. Costello from October 18, 1937 to December 31, 1945, as shown by the exhibits and testimony in this case? I don't want the figures yet; I just want to know whether you can. A. Yes.

Q. And have you put that information on this schedule, III? A. Yes, sir.

Q. And does it also reflect the cash balance as claimed by the Government on October 18, 1937— (2093) A. Yes.

Q. From the Government's exhibit? A. Yes.

Q. Now, can you tell us from the exhibits and testimony in evidence what cash there would be available to the Costellos as of December 31, 1945, after taking the opening balance of cash on October 18, 1937, as shown by the Government, and adding the cash receipts from ~~October 18,~~ 1937 to December 31, 1945, and deducting the cash disbursements of the Costellos during that period as shown by the exhibits and testimony? A. The cash balance at December 31, 1945—

Mr. MacMahon: Your Honor, I submit— A. —is eighty-four thousand—

The Court: You have been asked whether you can do it, and the answer is yes or no.

The Witness: Oh, I thought he asked for the figure. I am sorry.

The Court: ~~No, he~~ asked you could you do it.

The Witness: Excuse me.

The Court: I take it the answer is you can.

The Witness: Yes. I have it.

The Court: And you have put it on this Exhibit III?

The Witness: Yes, sir.

Alfred E. Sweeney—for Defendant—Direct

Q. And the figure you have put on the exhibit, is (2094) that right? A. Yes, sir.

Q. Now, Mr. Sweeney, on Government's Exhibit 362—here is the exhibit—there are two columns, one starting October 18, 1937, and then the next column jumps to December 31, 1945? A. Yes, sir.

Q. Is there itemized on Government's Exhibit 362 all of the receipts of the Costellos during that period? A. They are not itemized.

Mr. MacMahon: I object to that question. The exhibit speaks for itself.

The Court: Why isn't that so, Mr. Fennelly?

Mr. Fennelly: I wanted to develop the items are not itemized on the exhibit and we now have them itemized, and that is the basis of this—in other words, we have reduced this—

The Court: Why don't you ask the witness what he did and then, if the point arrives where you want to draw the contrast for the jury, all you have to do is follow what you developed when you cross examined the witness who put this in? When I say "this" I mean 362. And that is what you were referring to, was it not?

Mr. Fennelly: That is right.

Would your Honor like a copy of this, to follow along?

(2095) The Court: It would be helpful if you had one.

Mr. Fennelly: I would offer this in evidence now, and I think we could work from it.

Mr. MacMahon: Might I request some time to look at this?

The Court: Yes.

Mr. MacMahon: You will recall when we had these exhibits, we gave them to Mr. Fennelly overnight so he might prepare a preliminary cross exam-

ination. The Government requests the same privilege.

Mr. Fennelly: My only comment on the subject, if your Honor pleases, your Honor, over Mr. MacMahon's strenuous protests that we adjourn one day at 4 o'clock, did grant me a half an hour. However, I have no objection if Mr. MacMahon is granted one month.

(A pause.)

Mr. MacMahon: May I examine preliminarily, your Honor?

The Court: Yes.

Preliminary Cross Examination by Mr. MacMahon:

Q. Mr. Sweeney, I notice you have an item here, "Receipts claimed by the Government to cover investments and expenditures of Frank Costello in excess of reported gross income, $202,865.80." From what schedule did you (2096) get that? A. Government's Exhibit 362.

Q. Would you show me where on Government's Exhibit 362 any such statement is made? A. Final figure, investments and expenditures of Frank Costello in excess of his reported gross income.

Q. Doesn't say anything about receipts, does it? A. As claimed by the Government.

Q. Does it say anything about receipts? A. He couldn't spend it if he didn't have it.

Q. Does it say anything about receipts? Would you answer the question? A. It implies receipts.

Q. Does it say it? A. It doesn't use the word "receipts."

Q. Are you assuming then, Mr. Sweeney, that that money was received by Frank Costello? A. He couldn't spend it if he didn't receive it.

Q. Are you assuming it, yes or no?

Mr. Fennelly: I object.

Q. —yes or no.

The Court: The question is, did he, in making up this schedule, marked III for identification, assume that.

Q. (Continuing) yes or no.

Mr. Fennelly: Just a minute.

Your Honor, I object. On preliminary cross (2097) examination it appears that the figure is the identical figure taken from the Government's own exhibit.

The Court: Overruled.

Q. Did you make that assumption?

The Court: Did you make that assumption in making the calculation or in making the schedule which is now III for identification.

Q. Yes or no. A. The—
Q. Yes or no.

The Court: Are you able to answer that yes or no, Mr. Sweeney?

The Witness: As—under the basis—

The Court: Just a minute. I have asked you a question. Are you able to answer it yes or no?

The Witness: I did not assume it, no, sir.

The Court: Very well. All right.

Q. If you don't assume it, Mr. Sweeney, can you point to

the exhibit in evidence which says that, from which you took that information? A. From Exhibit 362.

Q. You just told me that didn't say it? A. It says it in—it says in figures. It is just that the word "receipts" isn't there.

Q. Yes, the word "receipts" isn't there. Where do you get the word "receipts"? On what do you base it, (2098) what exhibit in evidence? A. Because the schedule itself—

Q. On what exhibit? A. 362.

Q. You told me that didn't say anything about "receipts"? A. I say it doesn't use the word "receipts," yes.

Q. Doesn't say "receipts"? A. Yes.

The Court: Mr. Sweeney may—do you mind if I ask a question?

The Witness: Not at all.

The Court: Mr. MacMahon, do you mind if I ask a question?

Mr. MacMahon: Of course not, your Honor.

The Court: The Exhibit III for identification bears the title, "Statement of cash receipts and disbursements"—

The Witness: Yes.

The Court: —"October 18, 1937 to December 31, 1945."

The Witness: Yes, sir.

The Court: And then thereunder you list certain things as receipts and certain items as disbursements.

The Witness: Correct.

The Court: If you don't claim this item of $202,865.81 to be a receipt—

(2099) The Witness: I do, sir.

The Court: You assume it to be a receipt?

The Witness: No, sir.

The Court: I thought you said—

The Witness: A figure—from the figures—from the figures, it proves that the, the figures prove that, the Government has considered it as a receipt.

The Court: But Mr. MacMahon asked you whether or not in making the schedule, III for identification, you assumed that they were receipts, and I understood you to say you didn't.

The Witness: That is right.

The Court: If you don't consider them receipts—

The Witness: I beg your pardon, sir?

The Court: If you don't consider them—that figure to represent money received by the defendant—

The Witness: That is the confusion, sir, I do—

The Court: You do?

The Witness: —consider it to represent money received.

The Court: Very well.

The Witness: Yes, sir.

The Court: Then that answers Mr. MacMahon.

Q. Then you do make that assumption, is that right? A. I make that assumption based on the exhibit, yes.

(2100) The Court: You make the assumption. All right.

Q. You make the assumption— A. Yes.

Q. —do you not? A. Yes.

Q. That those were receipts, current receipts, of Frank Costello, is that right?

The Court: In that period?

Q. —in that period? A. Yes. Yes.

Mr. MacMahon: Your Honor, we at this time will not object to the admission of this schedule in evidence, but we reserve our right to move to strike after we have had an opportunity to cross examine in chief.

The Court: You always have the right to move to strike, yes. But at this time you don't object to the receipt of the exhibit in evidence, and it therefore will be received and marked.

(Defendant's Exhibit III for identification received in evidence.)

Mr. MacMahon: Mr. Fennelly, may we have a copy of this schedule?

Mr. Fennelly: Yes, indeed.

The Court: Oh, I am sure you will get one.

Mr. MacMahon: If you have two of them, Mr. Fennelly, it might help.

(2101) Mr. Fennelly: Your Honor, may I give copies of these to the jury so that they may follow the examination?

The Court: You may.

(Mr. Fennelly hands copies to the jury.)

By Mr. Fennelly:

Q. And, before I forget it, Mr. Sweeney, among the cases that you have testified as an accountant on behalf of the United States was the trial against Samuel Insull, the utility magnate, in Chicago, was it not? A. Yes, sir, I testified in that trial.

Q. Did you also testify—

The Court: On accounting matters?

The Witness: On accounting matters for the Government, yes, sir.

The Court: Very well.

Q. How many days were you on the witness stand, by the way, in that case in Chicago? A. It was, about, approximately three days.

Q. Did you also testify as an accountant on behalf of the United States in cases involving the Title Mortgage Company certificates? A. Yes, the Guaranty Mortgage Company cases; yes, I testified in one of them, worked on two or three.

Q. Now, then, coming to Defendant's Exhibit I, (2102) the balance, cash balance October 18, 1937 as claimed by the Government, cash in banks $1154.31— A. Yes, sir.

Q. —and cash on hand $30,000, those figures came from the Government exhibit, do they not? A. Yes, sir, Exhibit—

Q. 362? A. Yes, sir.

Q. And the total of those two figures is $31,154.31, is that right? A. Yes, sir.

Q. Then the next item on this schedule, the gross income on the tax return of Frank Costello $269,516.87, that figure also comes from Government's Exhibit 362, does it not? A. Yes, sir.

Q. Then the next figure that you have, you have it under a heading which says "Receipts claimed by Government to come"— A. "to cover."

Q. (Continuing) "to cover investments and expenditures of Frank Costello in excess of reported gross income $202,865.50; right? A. 81 cents.

Q. 81 cents. And that figure also comes from—which is the bottom figure on Government's Exhibit 262 on the first page—

The Court: 362.

Q. 362. Excuse me. Is that right? A. The first page, yes, sir.

(2103) Q. That is where you get that figure? A. Yes.

Q. Then the next line is income of Loretta Costello, $32,925.05, and that figure appears on the Government Exhibit 362, does it not? A. Yes.

Q. Now, then, the next figure of collection of loans receivable, loans receivable, at October 18, 1937, $5,000, that figure also comes from Exhibit 362, the Government exhibit, doesn't it? A. Yes, sir; it shows the elimination of that receivable.

Q. On Exhibit 362 between October 18, 1937 and December 31, 1945 they have eliminated the loan receivable; right? A. Yes, sir.

Q. As an asset. Now, then, the next item "Return of capital investment in Philip Kastel partnership" $9,500, that also comes from Government's Exhibit 362, does it not? A. Yes, sir.

Q. Then the next item "Return of capital investment in Philip Kastel partnership "based on Exhibit—$5,500, that figure you get from Government's Exhibit 30, do you not? A. Yes, sir.

Q. Now, then, the next figure is a refund by Jensen $290; is that right? A. Yes, sir.

Q. And that figure you get from the testimony of Mr. Jensen? A. That is correct.

(2104) Q. Record page 1032. A. That is correct.

Q. Then the next item New York Life Insurance Company dividends, $474.78, that item comes from the testimony of Mr. Lohse, does it not? A. Yes, sir.

Q. Then the next item you have return of advances to Joseph Stein, $7,000, and that figure comes from the testimony of the witness Stein, does it not? A. Yes, sir.

Q. Then the next item redemption of Phonofilm stock,

$2,780. That testimony comes from the witness Riker? A. That is right.

Q. Then the next item sale of Southold property you have "Cost $4,000"? A. Yes, sir.

Q. That comes from Government's Exhibit 9, does it not, an income tax return? A. Yes, this is the recovery of the cost.

Q. That is the recovery of the cost of the property, and that cost is shown on that tax return, is that right? A. That is correct.

Q. Now, then, the next item return of advances to 79 Wall Street Corporation, $500? A. Yes, sir.

Q. That you get from the testimony of Mr. Wolf? A. Yes.

Q. And the next item is the return of advance re Water Street tax lien, $9,500, and that you get from (2105) the testimony of Mr. Wolf, do you not? A. Yes.

Q. Now, then, the next item U. S. Savings Bonds redeemed, $765, that item you get from Government's Exhibit 349, do you not? A. Yes.

Q. Now, the total of all of these items is five thousand— A. No.

Q. What is this figure?

The Court: Five hundred and eighty-eight thousand, isn't it?

Q. $588,193.51, is that right? A. Yes, sir.

Q. Now, then, you have a heading "Cash disbursements" during this period and the first item, the expenditures of Frank and Loretta Costello, October 18, 1937 to December 31, 1945 as claimed by Government, $312,007.73; that figure you get from Exhibit 362, do you not? A. Yes.

Q. Then the next item is loans—you first have a heading which I didn't read, "Capital disbursements"? A. Yes.

Q. Loans payable at October 18, 1937, $6,000; right? A. Yes.

Q. 1940 purchase Southold property, $4,000; right? A. Yes.

Q. And that you got from Exhibit 9? A. Yes, tax return.

(2106) The Court: The previous item of six thousand also comes from Exhibits already in evidence; does it not?

The Witness: Yes, sir.

Mr. Fennelly: Yes, I am sorry. I overlooked that.

Q. The previous item of $6,000 came from Government's Exhibits 23 and 362; right? Is that correct? A. Yes, sir.

Q. Then the next item "Advance to Joseph Stein, $7,000" from the testimony of Mr. Stein? A. Yes.

Q. And the next item deposit New York Telephone Company $7,000, that you got from the testimony of—excuse me. The item I am at, deposit New York Telephone Company $150, that comes from Government's Exhibits 362 and 261, is that right? A. Yes.

Q. Then the next is, investment in Crescent Music Company by Loretta Costello $9,000. That item you get from Government's Exhibit 137, is that right? A. Yes.

Q. And the next item loan to Crescent Music Company by L. B. Costello $266.67, that comes from Government's Exhibit 137, is that right? A. Yes.

Q. And the next item loan to Crescent Music Company by L. B. Costello $2,766.66, that comes from (2107) Government's Exhibit 137, does it not? A. Correct.

Q. Then the next item "Purchase Sands Point property $18,000," that comes from the testimony of Mrs. Adoue, correct? A. Yes, sir.

Q. And the next item "Mortgage payment Sands Point property $768.88," that comes from the testimony of the

witness Barclay and Exhibit 362 schedule C-1; right? A. Yes.

Q. Then we bring forth the balances from that page to the next page, and the next item is 1944, the capital investment in Crescent Music Company by Loretta Costello of $10,833.34; that comes from Exhibits 112, 113 and 136, is that right? A. Correct.

Q. And the next item investment 79 Wall Street Corporation $52,500 comes from the testimony of Mr. Wolf; right? A. Correct.

Q. And the next item advanced to 79 Wall Street Corporation $500, that comes from the testimony of Mr. Wolf? A. Correct.

Q. The next item capital investment in Crescent Music Company by Loretta B. Costello, that is 1945, in the amount of $4,607.50, that comes from Government's Exhibit 136? A. Correct.

Q. And the next item in 1945 is the advance re the Water Street tax lien $9,500, that comes from Mr. (2108) Wolf's testimony, does it not? A. Correct.

Q. That he received that money from Mr. Costello.

And the next item capital investment Beverley Country Club $60,000, that comes from Government's Exhibits 362 and also 160? A. Correct.

Q. The next item mortgage payment Sands Point property $1,073.46; that comes from the Government Exhibit 362 schedule C-1 and from the testimony of Barclay, is that right? A. Correct.

Q. And the next item United States Savings Bonds $5,175, that comes from Government's Exhibit 362, is that right? A. Correct.

Q. Then you get a total of cash disbursements of $504,149.24; is that right? A. Correct.

Q. And that leaves you a cash balance on December 31, 1945 of $84,044.27? A. Yes, sir.

Alfred E. Sweeney—for Defendant—Preliminary Cross

Q. Now, then, have you prepared, Mr. Sweeney, a statement of the cash receipts and disbursements of the Costellos from January 1, 1946 to December 31, 1949 from the exhibits and testimony in evidence? A. Yes, from those sources.

Q. And Defendant's Exhibit for identification JJJ, is that the schedule that you have prepared (handing)? A. Yes, sir.

Mr. Fennelly: I offer it in evidence.

(2109) Mr. MacMahon: May I examine preliminarily, your Honor?

The Court: Yes.

Preliminary Cross Examination by Mr. MacMahon:

Q. Mr. Sweeney, this whole exhibit, Defendant's Exhibit JJJ, depends on the assumption that there was in fact $84,044.27 cash on hand as of the beginning of January 1, 1946, does it not? A. The figure starts off based on—

Q. Now, just yes or no. Does it turn on that assumption? Does this Exhibit JJJ depend on the correctness of that assumption? A. If I may explain—

The Court: Let me ask a question, please.

The Witness: If I may explain—

The Court: It starts off with that figure on the first schedule.

The Witness: Yes, forwarded from the other figure.

The Court: That comes from III. If that figure is erroneous it will affect the whole schedule of JJJ, will it not?

The Witness: If a—to an extent, yes.

The Court: To some extent, yes.

Q. To the extent that it is erroneous— (2110) A. If it is, it will affect it to that extent.

Q. Your whole schedule will be affected to that extent? A. Of course, yes.

Mr. MacMahon: No objection, your Honor, with the same reservation.

Mr. Fennelly: May I give copies of this to the jury?

(Defendant's Exhibit JJJ for identification received in evidence.)

By Mr. Fennelly:

Q. Mr. Sweeney, you were asked whether this figure $84,044.27, your opening cash or closing cash on December 31, 1945, was an assumption. Isn't that the figure that you arrive at from a mathematical computation on the Government exhibits? A. That is correct. That is correct, and includes cash in banks.

Q. As per the Government exhibits? A. Yes.

Q. This is a statement of the cash receipts and disbursements from January 1, 1946 through December 31, 1949, including the opening cash as of January 1, 1946 of $84,044.27, right? A. Yes.

The Court: What you are referring to when you say "this" is Defendant's Exhibit JJJ.

Mr. Fennelly: Defendant's Exhibit JJJ is the (2111) exhibit I refer to.

Q. The first item of receipts, you have salary, 79 Wall Street Corporation, $7,484.85. That figure you get from the Government's exhibit, do you not, 363? A. Yes.

Q. And the next item, cash drawings, Louisiana Mint

Company, $25,875, that comes from Exhibit 151, does it not? A. Yes.

Q. And all of these items that I am now examining you about are for the year 1946, right? A. Yes.

Q. Next item, cash drawings from Crescent Music Company, $11,500, is from Exhibits 122-A to G? A. Correct.

Q. Then the next item of $750, from United States Savings Bonds redeemed, that comes from Government's Exhibit 363-B, is that right? A. Correct.

Q. And then we have $137.60, which comes from the Sun Life Assurance Company dividends, from Government's Exhibit 363-E? A. Correct.

Q. And the next item, $25,000, loan from Frank Erickson, that comes from Government's Exhibit 363, right? A. Correct.

Q. Then the next item is $212.15 which is a refund from the Home Title Company, which comes from Exhibit 201-A? A. Correct.

(2112) Q. And the next item of $14,389.73, funds other than drawings from Crescent Music Company, deposited by Loretta Costello, that you get from Exhibits 43 to 47, 96, 122-A and 136-E? A. Yes.

Q. And the next item is $65—and how many cents, is that?

The Court: 15.

A. 15.

Q. 15, which is a deposit from an unknown source by Frank Costello. That you get from Government's Exhibits 361 and 361-C, right? A. It may come from one or the other because we have another item in '49. One or the other.

Q. I see. A. Or both.

Q. That gives you a total, between the receipts for 1946

plus the opening cash of $84,044.27, of $169,458.75, is that right? A. Opening balance plus receipts, yes.

Q. Now, then, let us take up the disbursements for 1946. You have an item, yearly expenditures per Government's Exhibit 363, $77,693.49, correct? A. Yes.

Q. Then you have an item, capital expenditures, loans to Crescent Music Company by Mrs. Costello of how much? A. $15,000.

(2113) Q. Then you have the principal payments—oh, that fifteen thousand comes from Exhibit 136, right? A. Yes.

Q. Then you have a payment on the mortgage at Sands Point property, payment as to principal, $769.51, right? A. Correct.

Q. Going over to the next page, you have the total of disbursements by the Costellos for the year 1946 at $93—A. $93,000.

Q. —$93,463, is that right? A. Yes.

Q. And deducting that sum from the cash at the beginning plus their receipts during the year leaves you a balance of how much? A. $75,999.75.

Q. Now, we will start, if you would, on 1947, and you carry that cash balance forward to the beginning of 1947, correct? A. Yes, sir.

Q. On the receipts, the first item is salary, 79 Wall Street Corporation, $6,555.68, correct? A. Yes.

Q. And the next item—by the way, which comes from Government's Exhibit 363-F? A. F, yes.

Q. And the next item, interest income, $117.81, which comes from Government's Exhibit 363-F? A. Yes.

Q. And the next item, George M. Levy, $30,000, that comes from Government's Exhibit 363-F, does it not? (2114) A. Yes.

Q. And the next item, United States Savings Bonds redeemed, $750, comes from Government's Exhibit 363-B, does it not? A. Yes.

Q. And the next item, Sun Life Assurance Company dividends, $42.60, comes from Government's Exhibit 363-E? A. Yes.

Q. The next item, loans from Frank Erickson, $25,000, comes from Government's Exhibit 363? A. Right.

Q. And the next item, return of a portion of the investment in Consolidated Television Corporation, $11,000, comes from the testimony of Mr. Wolf, does it not? A. Correct.

Q. And the next item, return of cash by New York City Property Clerk, $27,200, comes from the testimony of Mr. Wolf, and Exhibit 363-B of the Government, right? A. Correct.

Q. And the next item, funds other than drawings from Crescent Music Company, deposited by Loretta Costello, $18,683.37, that comes from Exhibits 43 to 47, 96, 122-A and 136, is that right? A. Yes.

Q. Now, then, the total of the cash receipts for 1947 plus your opening balance of cash amounts to $195,345.21, is that right? A. That is right.

(2115) Q. Now, then, turning to the disbursements—it is on the same page; it is on the front page—the first amount, the yearly expenditures per the Government's exhibit, for the Costellos for 1947, $76,477.66, is that right? A. That is correct.

Q. That is Exhibit 363? A. Correct. Let me give you—correct.

Q. And the next item of disbursements, under the heading "Capital expenditures, loans to Crescent Music by Loretta Costello, $10,750," right? A. Yes.

Q. The next item, principal payments on mortgage, Sands Point, $804.86, is that right? A. Yes.

Q. And that comes from Exhibit 363? A. Yes.

Q. And you carry your balance from the previous page

forward as to disbursements and we have investment in Consolidated Television Corporation, $22,080"? A. Yes.

Q. And we have a loan to Consolidated Television Corporation of $5,000, is that right? A. Yes.

Q. And the total disbursements for the year 1947 of the Costellos was, according to these exhibits, $15,032.52, is that right? A. Yes.

Q. Deducting the disbursements for the year 1947 from the cash on hand at the beginning plus the receipts for 1947, what balance do you have left? (2116) A. $80,312.69.

Q. Carrying that balance forward to 1948, let us look at the cash receipts of the Costellos for the year 1948. The first item, salary, 79 Wall Street Corporation, $6,000? A. Correct.

Q. And that comes from Government's Exhibit 363-F? A. Correct.

Q. The next item, interest income, $3,140.52, comes from Government's Exhibit 158, is that correct? A. Correct.

Q. The next item, George M. Levy, $15,000, that comes from Government's Exhibit 363-F, does it not? A. Correct.

Q. The next item, miscellaneous income, $9,500, comes from Government's Exhibit 363-F, does it not? A. Correct.

Q. And the next item, partial repayment of loan to Beverley—oh, yes, excuse me. These, now, under the heading of cash receipts, non-taxable. The first item, partial repayment of loan to Beverley Country Club, $16,819.51, which you get from Exhibit 158? A. Correct.

Q. And the next item, partial repayment of a loan to Crescent Music by Loretta Costello, $12,258, which comes from Exhibit 141? A. Correct.

(2117) Q. The next item is United States Savings Bond redeemed, $75, which comes from Exhibit 363-B? A. Yes.

Q. The next item is Sun Life Assurance Company dividends, $42.80, from Exhibit 363-E? A. Yes.

Q. The next item, Federal income tax refund, $11,701.08, you get from 363-E? A. Correct.

Q. The next item, funds other than drawings from Crescent Music Company, deposited by Loretta Costello, $12,743.60, comes from Exhibits 43 to 47, 96, 122-A and 136? A. Correct.

Q. Now, then, the total receipts plus the cash balance at the beginning of the year amounted to $167,593.20, did it not? A. Yes.

Q. Now, then, let us take up the disbursements of the Costellos for that year as shown by the exhibits in evidence.

The first item of $59,414.43 is the disbursements as shown by Government's Exhibit 363, is it not? A. Yes.

Q. And the next item, $841.85, is a principal payment on the mortgage on the Sands Point property, and that you take from Exhibit 363, right? A. Yes.

Q. Now, then, we go over to the next page, and (2118) we have $20,000 for the purchase of the Hollywood, Florida property, right? A. Yes.

Q. That you get from Exhibit 256 and the testimony of Mr. Ellis? A. Yes.

Q. The next item, a repayment on a loan of Frank Erickson, $20,000 is that right? A. That is correct.

Q. And what are the total of your disbursements as shown on this sheet, $100,256.28? A. Correct.

Q. Deducting the disbursements of the Costellos for that year from their cash receipts plus their opening cash balance leaves you a balance of how much? A. $67,336.92.

Q. Now, then, we take a look at the year 1949. You bring forward that cash balance of $67,336.92, right? A. Right.

Q. Now, then, the cash receipts for 1949, $6,000, salary, 79 Wall Street Corporation, you get that from Exhibit 363-F, do you not? A. Yes.

Q. And salary Beverley Country Club, $12,000, you get from Government's Exhibit 363—I can't read the symbol on it—is that right? A. Should be F.

Q. F. Then the next item, George M. Levy, $15,000, that comes from Government's Exhibit 363-F? A. Yes.

(2119) Q. The next item, miscellaneous income, $16,300, comes from Government's Exhibit 363-F, right? A. Yes.

Q. And the next item, income from R. L. Morris oil lease, $3,959.90, you get that from Government's Exhibit 363-F, do you not? A. Yes.

Q. The next item, United States Savings—and I now start on cash receipts non-taxable—next item is United States Savings Bonds redeemed, $750. You get that from Exhibit 363-B, do you not? A. Yes.

Q. And the next item, Sun Life Assurance dividends, $42.80, that comes from Government's Exhibit 363-E, does it not? A. Yes.

Q. And the next item, Federal income tax refunds, $6,124.52, comes from Government's Exhibit 363-E, correct? A. Yes.

Q. The next item, funds other than drawings from Crescent Music Company, deposited by Loretta Costello, $3,456.48, which you get from Exhibits 43 to 47, 96, 122-A to G and 136, right? A. Yes.

Q. Now, the next item, deposit from unknown source by Frank Costello, $1,078.80, Exhibits 361 and 361-C? A. Yes.

Q. Dendo—no, excuse me. A return of the Telephone Company deposit, $75. That comes from (2120) Government's Exhibit 363-B? A. Yes.

Q. And the next item, Dendo, refund, $138.36, comes from the testimony of the witness Dendo? A. Yes.

Q. Now, the total of the opening balances of cash plus the receipts totals $132,262.78, is that correct? A. Yes.

Q. Now, then, let us look at the cash disbursements for 1949. The first item $96,091.71 comes from Government's Exhibit 363, does it not? A. Yes.

Q. Now, you have on the schedule less the payment of two items, $450 and $399.50 which the Court has not

stricken out so we will have to make an adjustment for those two amounts for 1949.

The next item is the payment of principal on the mortgage of Sands Point $880.54; you get that from Exhibit 363, do you not? A. Yes.

Q. Now, the next item, the purchase of oil leases, R. L. Morris, a lease, leasehold cost $4,094.67; you get that from Exhibit 363-A? A. Yes.

Q. And the next item, R. L. Morris, a lease, the cost of the equipment $4,084.60; you get that from Government's Exhibit 363-A? A. Yes.

Q. The Halman Morris lease, leasehold cost $1,000, (2121) you get from Government's exhibit 363-A, is that right? A. Yes.

Q. The next item Collie lease, leasehold cost $4,000 you get from Government's Exhibit 368-A? A. Yes.

Q. And the last item, purchase—New York Central stock $2,155.62 you get from Government's Exhibit 363-B; right? A. Yes.

Q. Now, the total of those disbursements is $111,457.64, is that right? A. Correct.

Q. Now, deducting that amount from the cash at the beginning of the year plus the receipts leaves you a balance of cash of how much money? A. 20,805.14.

Q. Now, Mr. Sweeney, before we leave this matter. I would like you to make the adjustment on this schedule for the two items of disbursements, one of $450— A. Change this (indicating)?

Q. If you would, yes; you can put it right down below it. It is a matter of deducting from that final amount the amount of those two figures, is it not? A. Yes, yes.

Q. In other words, $450—

The Court: Were those two figures included in the total?

The Witness: Yes, sir. I had reduced the total (2122) of the expenditures by those two figures, so now—

The Court: Where did you make the adjustment—deduction? I suggest that you look at the first page of JJJ.

Mr. Fennelly: These are in 1949.

The Court: 1949, yes. And I ask you if this figure here (indicating) indicates that they have been included with this (indicating), have been added to this, or have they been disregarded? It is not clear to me. I have no point if you want it, except that it is quite unclear to me.

The Witness: You notice there is another figure down below of $880.54.

The Court: Yes.

The Witness: So, taking out the figures in parenthesis and adding on the $880.54 brings you out to the total at the bottom.

The Court: Why would you take that out? They had not been in before that, had they? Why would you deduct $450 and $399.50 from your figure of ninety-six thousand?

Mr. Fennelly: They hadn't been deducted.

The Witness: They were—

The Court: It is just a matter of arithmetic to me, but if is a long time since I did anything about it.

(2123) The Witness: Well, the two disbursements, sir, are included in the figure of $96,091.71.

The Court: Oh, I see. They are.

The Witness: Which was the Government schedule.

The Cout: Very well. So you have made an adjustment then.

The Witness: To add them back in, yes.

The Court: Very well.

By Mr. Fennelly:

Q. And adding back those two items as a disbursement still leaves you in 1949 with a cash balance of how much? A. $19,955.64.

Mr. MacMahon: What was that figure again, please?

(Record read.)

Q. Now, Mr. Sweeney, from your analysis of the Government's exhibits, was there any income of Frank or Loretta Costello for the years 1946 through 1949 that was not reported?

Mr. MacMahon: Your Honor, I object to the form of the question.

The Court: Sustained.

Mr. MacMahon: It calls for a conclusion.

Q. Well, can you tell us, Mr. Sweeney, from your (2124) analysis of the exhibits and testimony in evidence and from the schedule that you had prepared from it, whether there was any income of Frank or Loretta Costello that was not reported for those years 1946 through 1949?

Mr. MacMahon: The same objection, your Honor.

The Court: Sustained.

Q. Well, will you tell me, Mr. Sweeney, whether the schedule which you prepared from the Government's exhibits and testimony in this case indicates whether there was any income to Frank or Loretta Costello for any of the years between 1946 through 1949 that was not reported?

Alfred E. Sweeney—for Defendant—Direct

Mr. MacMahon: The same objection, your Honor.

The Court: Sustained.

Q. Mr. Sweeney, can you tell us from your analysis of the exhibits and the testimony in this case whether there was cash available to the Costellos to pay for all of the expenditures shown by the exhibits and testimony in this case for each of the years 1946 through 1949? A. Yes.

Mr. MacMahon: The same objection, your Honor. It calls for a conclusion.

The Court: Yes. And I will strike the answer. And I suggest, Mr. Sweeney, that on any of these questions (2125) along this line, it will be helpful to me if you will withhold your answer until I find whether an objection is coming, and that rule will prevail when you are under cross examination as well as when you are under direct examination.

The Witness: Yes, sir.

The Court: The objection is sustained and the answer is stricken, and the jury directed to disregard it. If we get to the point where the case is submitted to you you will get a further instruction that you are to disregard any and all evidence that is stricken, regardless by whom it has been introduced.

Mr. Fennelly: That is all, your Honor.

The Court: Very well.

Mr. MacMahon: Your Honor, may we have until 3 o'clock to familiarize ourselves with these schedules for the purpose of cross examination?

The Court: Yes.

Return at 3 o'clock, ladies and gentlemen.

(Recess at 2:00 p.m.)

(2126) AFTERNOON SESSION

(Jury present.)

ALFRED E. SWEENEY resumed.

Cross Examination by Mr. Pierpoint:

Q. Mr. Sweeney, are you a certified public accountant? A. No, sir, I am not.

Q. You were retained by Mr. Fennelly, is that correct? A. That is correct, yes.

Q. You are being paid to testify here? A. No, the firm I am working for was retained for all of the necessary work that Mr. Fennelly wanted done.

Q. They are getting a fee for it? A. Yes. I get a salary.

Q. You get paid by the firm? A. Yes.

Q. When were you retained by Mr. Fennelly? A. That was in November of last year.

Q. November 1953? A. Yes.

Q. Do you have your copy of Defendant's Exhibit III? A. No, sir, I don't have a copy.

The Court: Did you give us the name of your firm? I don't recall. Would you mind repeating it, if you did.

The Witness: I shouldn't say, sir. Wiley, (2127) Block & White.

The Court: White is the last name?

The Witness: White, W-h-i-t-e.

Q. Mr. Sweeney, this figure on Defendant's Exhibit III, the figure which you showed as 202 thousand odd—, A. Yes.

Q. —that figure is included on the assumption that that amount of money was received by the Costellos during this period from 1937 through to 1945, is that correct? A. I

have included it because I based my figures on the Government's exhibit which shows that.

Q. We went all through this on preliminary cross examination and I think the answer we came out was that you assumed that it was receipts.

Mr. Fennelly: I object to that because the witness—

A. I don't assume that.

Mr. Fennelly: —so testified, your Honor, the figure is in the Government exhibit.

The Court: Yes.

Mr. Fennelly: And it is expenditures.

The Court: We did have questioning about that, and I asked the question of the witness, and my recollection of his answer is that he assumed that it had been received. If I was incorrect about that, I suppose (2128) now is as good a time as any to straighten me out.

The Witness: I would like to modify it some, your Honor, in that it could have been from the beginning and I have no information other than the figures as shown on the Government's exhibits.

The Court: No. That may be so, but, you see, you were asked whether or not you made an assumption, and I understood you to say that you did, and I understood you to say, moreover, that the assumption that you made was that that figure of $202,865.84 had been received by the defendant and his wife during the period from 1937 to 1945, or isn't that what you said?

The Witness: I should correct that.

The Court: If you wish to correct it, you may.

The Witness: Yes.

The Court: And now tell us what assumption you made, if you made any.

The Witness: I have used a figure from the Government's exhibit that indicates that it was funds used for the expenditures.

The Court: But the questioning came about because in your Exhibit III you described these funds as receipts.

The Witness: Yes.

The Court: Did you then assume them to be (2129) receipts and base your calculation on them in that character?

The Witness: I determined that the Government's exhibits treated them as a receipt because they entered into the net—

The Court: Very well. That is what you say you think the Government did, and did you follow the same assumption that they are receipts because all we are trying to ascertain is—

The Witness: I followed that assumption but only because they did, sir.

The Court: Well, the reason you did it is not too important.

The Witness: Yes.

The Court: But, rather the fact of what you did. But is it true, now, that you did assume them to be receipts?

The Witness: For the purpose of taking it from the Government's exhibit, yes, sir.

The Court: Let me ask you this way, did you assume that the Government considered them receipts?

The Witness: I did assume that the Government considered them receipts, yes.

The Court: Therefore, because you assumed that the Government assumed them to be receipts you did (2130) also?

The Witness: Yes.

The Court: Very well.

By Mr. Pierpoint:

Q. Now, Mr. Sweeney, you said that you were here all during the testimony in the case and that you have examined all the exhibits. Did you examine Government's Exhibit 350-A; were you here when I read from that exhibit?

Mr. Fennelly: Excuse me. Counsel is misquoting what Mr. Sweeney said. Mr. Sweeney responded in answer to a question as to whether he was familiar with them.

The Court: Do you desire now to ask the witness whether or not he was present, if that is the point of the objection?

Q. Mr. Sweeney, were you present during all the testimony in the case? A. To the best of my knowledge I was here at all times. I do think there was one morning I was a few minutes late.

Q. Did you examine all the exhibits? A. Not all of them, no.

Q. Well, were you here in the courtroom when I read Government's Exhibit 350-A? A. May I—

Q. I will show you Government's Exhibit 350-A (2131) (handing). Do you remember that one? A. Yes, I seem to recall that, yes.

Q. That is an affidavit signed by the defendant, is that correct, or it is an excerpt from an affidavit signed by the defendant, is that correct? A. That is my understanding.

Q. That is what it says, doesn't it? A. Yes, that is what it says at the heading.

Q. And it is in evidence? A. Yes.

Q. Now, isn't it a fact, Mr. Sweeney, that, according to this exhibit, in the year 1944 the defendant Costello lost $27,200 in a taxicab? A. Yes.

Q. That is the fact, according to this exhibit? A. According to the exhibit, yes.

Q. Which is in evidence? A. Right.

Q. Now, would you take Defendant's Exhibit III which is supposed to cover the period during which this money was lost, and will you show me where under disbursements that $27,200 in the taxicab is shown? A. I didn't consider that as disbursement.

Q. I didn't ask you what you considered it. Will you show me where it is shown in there under disbursements? A. No, it is not shown.

Q. It is not shown at all? A. No.

Q. So that if it shows under disbursements this (2132) balance you come down with $84,044.27 would be reduced by $27,200, is that correct? A. If you say—

Q. If it was shown as disbursements? A. If it were to be shown as a disbursement, yes. Also, though, if he received it the receipt would have to be shown.

Q. Now, Mr. Sweeney, that is a very interesting point. A. I say if he did; I don't know.

Q. You don't know whether he received it or not? A. No.

Q. Well, now, Mr. Sweeney, will you take Government's Exhibit 362—have you got a copy of that there? A. Yes.

Q. Well, first of all, Mr. Sweeney, let me show you your Exhibit JJJ, and under 1947 you show a figure— Well, we will let that pass for the moment.

Let us look at Government's Exhibit 362 for a moment and, more specifically, Government's Exhibit 362-B, which is a schedule of other assets, and do you find in there an

item of $27,200 shown as an asset due from Police Property Clerk? A. Yes, I see a figure of $27,200 due from the Police Property Clerk.

Q. So isn't it a fact, Mr. Sweeeny, that in your Exhibit III, Defendant's Exhibit III, that $27,200 is in there as a receipt as part of that two hundred thousand (2133) which you took from the Government exhibit? A. No.

Q. It is not in there? A. No.

Q. It is on Government's Exhibit 362, and that is where you got the figure? A. But that $27,200 is not in there.

The Court: Not in where? We have been talking about two or three exhibits.

Q. Now, Mr. Sweeney, perhaps we could just go down the arithmetic here.

Government's Exhibit 362-B shows as an asset on hand during the—as an asset on hand on the 31st of December 1945 $27,200 due from Police Property Clerk, is that right? A. Correct.

Q. And that comes over under the face of Government's Exhibit 362 as part of the other asset; is that correct? A. That is correct.

Q. And then all the assets at December 31, 1945 are totaled up including that $27,200? A. That is correct.

Q. And the net worth at 10/18/37 is subtracted from that figure, is that right? A. Right, that is correct.

Q. So that we have an increase in net worth during the period as the result of that subtraction, is that (2134) correct? A. That is correct.

Q. And the twenty-seven thousand two hundred is in that increase in net worth, is that correct? A. That will be correct.

Q. But it isn't in Government's Exhibit 362? A. What—

Q. You said it wasn't in there. But it appears it is in

the change in net worth? A. I think you just showed me that twenty-seven thousand is in—

Q. You said it wasn't. A. No, I didn't.

The Court: Did you not say that it was not reflected in the figure of $202,865.81?

The Witness: Yes; yes, sir.

The Court: And you now say that it isn't reflected?

The Witness: Yes.

Q. Well, now, it is up here in this figure on Government's Exhibit 362, the change in net worth, isn't it? A. Yes, it is in there.

Q. Which is the figure of increase in net worth $199,721.49 that is in there? A. That is correct.

Q. To that figure you add yearly expenditures on Government's Exhibit—we add yearly expenditures on Government's Exhibit 362; is that right? A. That is correct.

(2135) Q. So that the twenty-seven two is still in there, we haven't taken it out; it is still in there? A. That is correct.

Q. So we get it down here to total investments and expenditures of $511,729.42, and the twenty-seven thousand two hundred is still in that, isn't it? A. Yes.

Q. Then we take out non-taxable receipts of $6,421.69; is that right? A. That is correct.

Q. And that twenty-seven two isn't in there, it couldn't be; it is twenty-one thousand two small, is that right? A. Right.

Q. So after we take out the non-taxable receipts we have $505,307.73, and the twenty-seven thousand is still is there? A. Yes.

Q. Twenty-seven two is still there. We are getting closer. Then we take out, out of the gross income of Loretta Costello which is $32,925.05. Now, that twenty-

seven thousand two hundred, is that shown on Mrs. Costello's tax return anywhere? A. No.

Q. So when we substract that out we get $472,382.68, and the twenty-seven two is still in there, is that right; it wasn't on Mrs. Costello's tax return so it is still in there; it was in there to begin with and we haven't got rid of it yet; is that right? A. That is right.

(2136) Q. Then we get down here, gross income reported by Frank Costello $269,516.87; is that twenty-seven thousand two hundred on Costello's tax return anywhere? A. No.

Q. So it is still in there. Subtract it, you come down to this figure of $202,865.81, and it is still in there, is that right; we haven't take it out anywhere? A. O.K. Wait a minute, wait a minute. What was the last question?

The Court: Whether or not the sum of twenty-seven thousand two hundred does not remain in the figure of $202,865.87.

The Witness: Just a minute.

The Court: 81 cents.

Q. Well, now, Mr. Sweeney, before you go back—

The Court: Just a minute.

Q. —we didn't get it out.

The Court: The witness said to wait a minute, he wants to check some figures there. Now, give him a chance to do it.

A. I know it is in there but I would like to explain, because the—

The Court: Now, before you explain, let us find out what your position is with respect to whether or

not the twenty-seven thousand two hundred is in that last (2137) figure on the Exhibit 362 or whether it is not.

The Witness: It is in there, it is in there as investment.

The Court: Now, you wish to say something with respect to that. What is that?

The Witness: Because it is one of the figures that enters into the investment part of the balance sheet, and this caption against the last figure says, "Investments and expenditures of Frank Costello in excess of his reported gross income as claimed by the Government." It is in there, but in the change in investments part that is in there.

The Court: Well, that may be so, but we have now established that you agree that the twenty-seven thousand two hundred is included in that figure.

The Witness: Yes, it is included in that figure as part of the investment.

The Court: All right.

Q. And it is not included in the disbursements side of your Exhibit III, is that right? A. No, I didn't treat it as a disbursement.

Q. I know you didn't, Mr. Sweeney. A. I treated it as a receipt and disbursement when it was returned by the Property Clerk. In the meantime, it was in the nature of, similar to escrow funds.

(2138) The Court: When was it returned, as you recall it?

The Witness: It was returned in 1947 and used for the payment of taxes, so I have treated it as a receipt that time.

Q. And the defendant didn't have it during that period to spend; did he? A. Well, it was beyond his spending, but it was, as I say, it was tied up.

Q. And he lost it in the taxicab, he might just as well have spent it? A. No, he finally got it back; it was tied up in litigation.

Q. As a matter of fact, he didn't get it back, Mr. Sweeney, a good part of it went to the Tax Collector, didn't it? A. He got it back and paid taxes with it.

Q. He spent it in 1947 but he couldn't spend it in the meanwhile, could he? A. But the Government has included the spending of it, the Government has included the spending of it in the '47 expenditures but didn't pick up— I am picking up, in '47 I am picking up the receipt of it and offset the expenditures part.

Q. Well, now, Mr. Sweeney, you have picked it up as a receipt in 1944 because it is in the figure of $202,000, isn't that correct? That is just what you went through, Mr. Sweeney. You said the two hundred and two—

(2139) The Court: Just a minute, now, please.

Exhibit III in evidence is your calculation entitled "Statement of cash receipts and disbursements, October 18, '37 to December 31, '45." That is correct, isn't it?

The Witness: That is correct, yes.

The Court: Very well.

Q. And you say that as part of that figure of $202,000 that you got from Government's Exhibit 362, it is included in the receipts side of your Exhibit III, is that correct? A. Well, you notice this figure is the excess—investments and expenditures of Frank Costello in excess of reported gross income.

Q. And you have— A. So—

Q. —assumed, I believe, it is receipts?

The Court: Wait a minute. The witness hasn't finished his answer. Let him finish.

A. So, this amount is included in the overall change in investments—overall change in investments. So all the figure says at the bottom is that investments and expenditures—or the change in investments and expenditures were in excess—in excess of reported gross.

Q. That is correct. A. So, and then it follows through, then, that such excess—if such excess is in (2140) excess of and not derived from the change in net worth, nor from reported income, the Government takes the position that it is derived from—

Q. Receipts? A. Other receipts. Other receipts.

Q. All right. Mr. Sweeney, this $27,200 appears as an asset—arises as an asset some time between October 18, 1937 and December 31, 1945, is that correct? A. Escrow cash. Cash similar to cash held in escrow pending the outcome of litigation.

Q. Before the defendant Costello could lose it in a taxicab he had to get it from somewhere, didn't he? A. I am informed that he did get it somewhere, but I don't think there is anything—

Q. Do you have to be informed—

The Court: Isn't the point of it, he had to have it? Is it important to determine now where he got it. I think the point of your question really is, before he lost it, he really had to have it.

Mr. Pierpoint: That is my point.

The Court: Then you don't need to get into the question of where it came from because that is not important.

Mr. Pierpoint: No, your Honor, it is not. The fact is he got it somewhere before he lost it.

Alfred E. Sweeney—for Defendant Cross

The Court: If you stay with the position that (2141) he had it, your get out of the problem of inquiring down the side lane where he got it from.

Mr. Pierpoint: I don't inquire where he got it, your Honor.

The Court: That is just the difficulty, Mr. Pierpoint. You have been suggesting just that. Now, please take it that he had it.

Q. After he lost it in the cab, he didn't have it any more? A. But he had it in—sort of being held pending the outcome of litigation. It was only set to one side.

Q. That is correct? A. Fortunately, it was found in the cab and turned over to the Police Property Clerk.

Q. So it appears in this $202,000, which is the final figure on Government's Exhibit 362? A. Well, the trouble with this figure of two—

Q. I didn't ask you the trouble with the figure. I asked you whether it appeared in there, Mr. Sweeney. A. It does appear. It does appear in—

Q. All right. Now, Mr. Sweeney, let us look at Government's Exhibit 362 again, and more particularly at Government's Exhibit 362-A. Now, the item there is "Cash in banks," is that correct? A. Yes.

Q. And as at October 18, 1937 the cash in banks (2142) is some one thousand one hundred odd dollars, is that correct? A. That is correct, as shown—

Q. And as at December 31, 1945 there is a lot more money in the bank, is that correct? What is that figure there? A. $29,506.71, per schedule A.

Q. And per these exhibits that are marked on the side, is that correct? A. That is correct.

Q. I wonder if you would subtract those two figures for me, the $1,154.31 and the $29,506.71?

Do you have that? A. Yes.

Q. What is the figure? A. $28,352.40.

Q. $28,352.40 that the Costellos had during that period and left in the bank, is that correct? A. Yes, it represents—

Q. It is money they put in the bank? A. Increase in the bank balance.

Q. That is money they put in the bank, is that correct? A. Yes.

Q. That figure, $28,352.40, that is also in this $202,000, isn't it? A. Yes. The whole change in investment is—

Q. It is in that figure of $202,000, isn't that correct? A. It is.

Q. Just the way the $27,200 was, right? A. Just a minute. Yes, yes. All—

(2143) Q. Yes. A. All the—

Q. Show me, Mr. Sweeney, on your schedule, III, Defendant's Exhibit III, where, on the disbursements side, that figure of $28,352.40 appears? A. Will you repeat that again?

Q. Will you show me on the disbursements side of your schedule, III, where that figure of $28,352.40 appears? Does it appear there? A. This increase in the bank balance?

Q. The figure of $28,352.40, which you say is in the two hundred thousand you have on the receipts side, where does that appear on the other side, disbursements side? A. Well, on my schedule I have a—

The Court: First of all, does it appear? Let us ascertain that first.

The Witness: No, it doesn't appear.

The Court: All right.

Q. All right, just like the $27,200 does not appear? A. I don't take the position it should appear.

Q. I am sure you don't.

Alfred E. Sweeney—for Defendant—Cross

The Court: Well—

The Witness: Now, may I explain my answer, your Honor?

The Court: Let us just get the answers and let (2144) us avoid argument either by the questioner or the witness, and let us ascertain some facts. The way we run trials, there will be a time for argument but this is not the time. Let us get along.

The Witness: Thank you. I just wanted to explain it.

The Court: I understand that, but, now, if there is anything in the cross examination that requires elucidation, Mr. Fennelly will have an opportunity to do it.

The Witness: All right.

Q. Mr. Sweeney, on your schedule, Exhibit III, down towards the end of the receipts, receipts section of it, for the year 1943, you have an item, "Redemption of Fonofilm stock, $2,780," is that correct? A. That is correct.

Q. Mr. Sweeney, I show you Government's Exhibit 230, which is the stock certificate redeemed and the stub of it, and that says that this stock was acquired on January 29, 1942. Now, where on your schedule of disbursements do you show the disbursement for the acquisition of that stock? A. I don't recall that there was any evidence establishing that he had paid anything for it.

Q. Let us assume, Mr. Sweeney, that he did not pay (2145) anything for it, that he got it for nothing, and that he disposed of it in the year 1943 for nothing. That $2,780 would be a taxable capital gain, wouldn't it?

Mr. Fennelly: Your Honor, I object to the question. There is no proof in the record whatsoever of how the stock was received, whether any price

was paid for it at all. The Government has proved absolutely nothing about it. All they have shown is that Mr. Costello received back that sum of money when he turned the stock into the corporation. That is the only proof in the record about it.

Mr. Pierpoint: Your Honor, I am assuming right now that he didn't pay anything for it.

The Court: All right, go ahead.

Mr. Fennelly: Then how can you have a question, was it a taxable gain? Suppose the man who gave it to him had spent $2,780 for it? That would be the donor's cost and there would be no gain.

Mr. Pierpoint: I am making the assumption here, your Honor, that he paid nothing for it.

The Court: Go ahead.

Q. And if he paid nothing for it, the $2,780 would be taxable capital gain, is that correct?

Mr. Fennelly: I object to it. Your Honor (2146) can decide the law. That is a question of law.

The Court: It would be income to him, wouldn't it?

Mr. Fennelly: I am sorry if I must object to your Honor's question, but I would be delighted to have you—

The Court: Sustained.

Mr. Fennelly: —your Honor, instruct the jury—

The Court: Any time you object to any of my questions, I am going to sustain it. You have that assurance now.

If you want to get a determination of whether or not this would be a capital gain, if you want to make this man an expert on it, you had better give

him enough facts from which I can make a determination, but I don't think you have as of now.

Q. Well, Mr. Sweeney, assume that the stock was given to the defendant for services rendered, that he didn't pay any—that he didn't pay money for it—

Mr. Fennelly: I object, your Honor.

The Court: Wait until the question is finished.

(To the witness) You withhold your answer. Remember, when you were on direct examination, I suggested that you withhold your answer so that the prosecutor's objection might be heard. You, I am talking to, Mr. (2147) Sweeney. I now give you the same direction, to withhold any answer to this hypothetical until Mr. Fennelly has an opportunity to make whatever objection he desires to make, if he desires to make any.

The Witness: Thank you, your Honor.

The Court: All right, go ahead.

Q. Assume, Mr. Sweeney, that the stock was received by the defendant without any monetary consideration whatever—

The Court: Now, is there any evidence with respect to these facts that you are going to ask him to assume?

Mr. Pierpoint: Your Honor, the evidence in the record—

The Court: Now, listen. We don't need an explanation. I asked you a question, which you ought to be able to answer rather readily. If you are going to propose to this witness a hypothetical question, I think that you ought to base it on evidence in the record.

Alfred E. Sweeney—for Defendant—Cross

Mr. Pierpoint: Well, your Honor, the evidence in the record shows the date of acquisition of the stock.

Well, maybe we can go about this another way.

Q. Assume that the defendant's tax return for the year 1944, the year in which—or the year 1943, the year in which his stock was retained, assume that that (2148) tax return shows no capital gain and no capital loss with respect to his stock, do you have sufficient experience in tax matters to tell us whether or not that shows that the stock was bought for the same price for which it was sold?

Mr. Fennelly: I object to it, your Honor.

The Court: Sustained.

Q. Mr. Sweeney, on the receipts side of your schedule here you have an item, "Gross tax return income of Frank Costello," is that correct? A. That is correct, yes, sir.

Q. And that includes—

The Court: Are you talking about III?

Mr. Pierpoint: III, your Honor.

Q. And that includes all of the income as shown on the defendant's 1943 tax return, is that correct? A. Your question was what?

Mr. Pierpoint: Would the reporter read it?

(Question read.)

A. Well—

The Court: Pardon me, where is that?

Mr. Pierpoint: Your Honor, on schedule III.

The Court: I just want to find it.

Mr. Pierpoint: Under "Cash receipts; gross tax return income of Frank Costello."

(2149) The Court: That is that figure of $269,000?

Mr. Pierpoint: Yes.

Q. Where did you get that figure of $269,000? A. From Government's Exhibit 362 and supporting schedule E of that exhibit.

Q. Let us look at schedule E. Let us look at the line for 1943, and over underneath Louisiana Mint Company you have an item of $60,813.43, is that correct? A. That is correct.

Q. Do you know of any income shown on the defendant's income tax return that is not included in that figure of $60,813.43? A. I would have to look at the return.

Q. All right, let us look at the return.

Do you find any income reported on that return—

The Court: You are now calling the witness' attention to what?

Mr. Pierpoint: Government's Exhibit 10, your Honor.

A. Yes, the return reports the gross income of the same figure that is on 362-E.

Q. That is the same figure, and that figure is included in the figure that is shown on Government's Exhibit 362 and, therefore, it is included in the figure (2150) that is shown on your Exhibit HH as gross tax return income of Frank Costello and, therefore, the gross tax return of Frank—gross tax return income of Frank Costello includes all the income that is shown on his 1943 tax return? A. Not—it requires an explanation. That requires an explanation.

The Court: First of all, is it a fact? Will you answer the question?

The Witness: Yes.

The Court: Is that figure included, $60,000 figure —$60,813.43—included in that figure of $269,516.87?

The Witness: It is.

The Court: Which is denominated, "Gross tax return income of Frank Costello on Defendant's Exhibit III. It is included?

The Witness: It is included.

The Court: You say that requires an explanation?

The Witness: Well, perhaps not at the moment. It is included.

The Court: All right, it is included.

Q. I think I asked you before, Mr. Sweeney, if this figure of—if there was any figure in the disbursements side of your schedule, III, for the acquisition of this stock, Fonofilm, is that correct? (2151) A. No, I have no figure for the acquisition because there was no evidence from which I could base it.

Q. So, basically, you are assuming nothing was paid for it, is that correct? A. All my work is on the basis of the exhibits in evidence; and I cannot assume anything except,—

Q. The absence of the figure assumes that there wasn't anything paid for it, is that correct? A. No, just proves that nothing has been shown one way or the other.

Q. But the absence of the figure—if something was paid for it, then your schedule would be inaccurate? A. If something—

Mr. Feinelly: Excuse me. That wouldn't follow. It would follow the Government's schedule was in

accurate because that is what Mr. Sweeney has based his on.

The Court: That is argument which you may make at the appropriate time, but I think this isn't it. However, go ahead.

Q. Isn't that correct, that your schedule assumes that there was nothing paid for that stock? A. Well, I will say that this--

Mr. Fennelly: Excuse me: I object to it, your Honor, on the ground that it is incompetent. The (2152) witness has already testified that his schedule assumes nothing. It is based solely on all the Government's exhibits and on the Government's schedule.

The Court: Well, it isn't quite accurate to say that he has said that his testimony assumes nothing. This morning, and again this afternoon, he did say that he made some assumptions.

The Witness: Yes, sir.

The Court: That he assumes that that $202,000 was receipts.

Mr. Fennelly: I wouldn't think that that is the answer. The answer is that he said, as I understand—

The Court: It is the answer to your statement that he made no assumptions.

Mr. Fennelly: No, your Honor; I didn't understand the witness that way.

The Court: Very well.

Mr. Fennelly: He said that the Government assumes that and he has taken the Government's assumption.

The Court: Well, I suppose—

Alfred E. Sweeney—for Defendant—Cross

Mr. Fennelly: He has no assumption. He is an accountant and he takes figures from exhibits and analyzes them.

The Court: All right.

(2153) *By Mr. Pierpoint:*

Q. And if there was money paid for that stock, the expenditure side of your schedule would be in error, is that correct?

Mr. Fennelly: Just a minute. I object.

The Court: I will allow it.

Mr. Fennelly: There is no evidnce in the record, and they are now assuming things that are not in evidence.

The Court: You may answer the question. The objection is overruled.

A. If a—

Q. I think that question, Mr. Sweeney, is susceptible to a yes or no answer. A. Based on the assumption of —that it had cost, it should have been included, had I been able to do so.

(2154) Q. And Government's Exhibit 10, the 1943 tax return of the defendant, showed no capital gain on the stock; is that correct? We will have it back. A. No capital gain was reported on that.

Q. As a matter of fact, there is nothing on this tax return that would tell you he even had it, is there? A. Well, these returns don't carry—

Mr. Fennelly: I object to that. There isn't anything on tax returns that you put down what you have.

The Witness: There is no balance sheet.

Mr. Fennelly: It isn't supposed to be on the return.

The Court: Well, I suppose it is quite correct when the witness says, having looked at this exhibit, that it does not appear on this tax return.

Mr. Fennelly: My objection is, your Honor, to the question, because the tax return does not provide that anybody said whether he owns 100 shares of United States Steel or whether he doesn't own 100 shares of United States Steel.

The Court: Correct.

Mr. Fennelly: And that is why I say that the question is unfair, and, therefore, it is objectionable.

(2155) The Court: Well, I don't think it is objectionable. I don't think it helped us any, but it is not objectionable when I overrule the objection.

And, now, you have stated your view to the jury, and I suppose if they have made out tax returns they know what you have just suggested.

Now, I think maybe the jury might like to have a little recess for about five minutes. The Court would also.

(Recess)

By Mr. Pierpoint:

Q. Now, Mr. Sweeney, on Defendant's Exhibit III, your schedule there— A. Yes.

Q. —down at the bottom of the receipts you have an item 1944 U. S. Savings Bonds redeemed. A. Yes.

Q. $765. Is that correct? A. That is correct.

Q. Now, will you show me on the schedule the disbursement for the purchase of that war bond that was redeemed? A. I have an item Purchase of U. S. Savings Bonds $5,175.

Q. Now, are you sure that that one that was redeemed is in there? Can you answer the question, Mr. Sweeney? (2156) A. Just a minute. I am checking.

Q. Did you understand the question? A. Yes. You wanted to know whether the bond that was redeemed is in the figure of $5,175.

Q. That is correct. What do you need to make sure, Mr. Sweeney? A. I am looking now. I would need the exhibits of the bond purchases.

Q. All right, sir. I am handing you Government's Exhibits 349, 349-A and 349-B. A. Well, in order to determine that for sure I would have to make a recheck of these bonds. It would take quite a little while. I don't know whether you would like me to do it later and report to you.

Q. Where did you get that figure for the purchase of the bond? A. The figure for the disbursement for the bonds I took from Schedule B of Government's Exhibit 362.

Q. And if that bond that was redeemed wasn't included in the amount shown on Government's Exhibit 362, then you don't show a disbursement for the bond redeemed; is that correct? A. I would say that is correct, yes.

Q. And if I told you that that bond wasn't included in that figure, then your schedule would be (2157) an error by the purchase of the bond, is that correct?

Mr. Fennelly: No. Excuse me. Not just your telling him that it would be.

The Court: Sustained.

Mr. Fennelly: You have to go a little further than that.

Q. Well, now, Mr. Sweeney, suppose you take Government's Exhibit 349 and Government's Exhibit 349-A and

suppose you find the bonds that were purchased prior to December 31, 1945.

(A pause)

All right, now add all those up, Mr. Sweeney. That is a "4" there, is it not?

A. Oh, yes.

Q. Now, what figure did you get when you added, Mr. Sweeney? A. I have fifty-nine fifty-four.

Q. And will you take the figure that you took for disbursements for bonds? A. A difference.

Q. What is the difference? A. Seven hundred seventy-nine.

Q. Well, giving or taking a few dollars for mistakes in your addition here on the stand, would that indicate to you that that redeemed bond had already been taken out of the disbursement for the bond? A. Well, offhand I would say that it—

(2158) Q. Have you got any doubt about it, Mr. Sweeney? A. What?

Q. Have you got any doubt about it? A. No, it looks as though there is a possibility that that one should have been excluded.

Q. Have you got any doubt about it, Mr. Sweeney? A. Well, let's say I assume—

Q. Have you got any doubt about it, Mr. Sweeney? A. I would like to check it.

Q. Have you got any doubt? A. We will say at the moment it looks as though—that that, because of that particular bond, should be included in the disbursements.

Q. Have you got any doubt about it, Mr. Sweeney? A. We will say I have no doubt. If I find it to be different I could—

Q. So your schedule is in error by the amount for disbursement for that bond? A. I think so, to that extent, yes.

Q. Now, Mr. Sweeney, on your Schedule III can you show me where there is a disbursement for any original investment in the Louisiana Mint Company? A. There is none shown, because upon examination of their books I found there was no original investment.

Q. So you showed no disbursement for any (2159) investment in Louisiana Mint Company, is that correct? A. That is right, because the records were; the records show no—not by Costello.

Q. Now, Mr. Sweeney, have you got Government's Exhibit 362 there? I believe you have a copy of it. Looking at Government's Exhibit 362-B which shows investments

The Court: D?

Mr. Pierpoint: B, your Honor.

Q. It shows an investment—you got the wrong exhibit here. That is 363. Exhibit 362-B shows under date the end of December, 1945, an investment in the Louisiana Mint Company of $17,636.40, is that correct? A. That is correct. That is the—

Q. And that figure— A. That is right — Did you say investment?

Q. Well, that is, it shows on the schedule, right, on 362-B? A. Yes, that is on the schedule.

Q. That is what it shows there, is that correct? A. Yes, but I mean—

Q. The question I asked you, Mr. Sweeney, is whether or not that figure is shown on Government's Exhibit 362-B. A. Just so you don't imply that it is an original investment.

(2160) Q. Mr. Sweeney, the question I asked you, is that

investment shown on Government's Exhibit 362-B? A. There is an item labeled Investment shown there, right.

Q. Now, that item, in turn, is carried forward to the face of Government's Exhibit 362 and becomes a part of this $202,000, is that correct? I think you can answer that yes or no, Mr. Sweeney, and I would like to have a yes or no answer. A. If I do, I will probably mislead the jury.

Q. Will you answer the question yes or no, Mr. Sweeney? A. On the basis of the—

Q. Mr. Sweeney, I asked for a yes or no answer, and I think that question is susceptible of a yes or no answer.

The Court: It is; and I direct the witness to answer it.

A. The figure is included in the final total, but I would like to explain, if I may, your Honor.

The Court: Now you may explain it.

A. In setting up this schedule, Exhibit 362, the arithmetic is being worked here to work down to a figure which the Government labels—

The Court: Now, just a minute, Mr. Sweeney.

(2161) The Witness: Excuse me.

The Court: Before you go any further, you are not explaining whether that 17,000 is in that 202,000, are you? Are you rather not now making a discourse on the method by which 362 was computed?

The Witness: I suppose I was—

The Court: Yes.

The Witness: —anxious.

The Court: It seems you are, and I suppose if counsel for the defendant believes that relevant and

material he will, sometime before you leave the stand, ask you.

The Witness: Yes.

The Court: But you were asked the question which was whether $17,636.40 was included in the figure of $202,865.

I understand your answer to be that it is. All right, go ahead.

The Witness: May I—

The Court: You may not give us a discourse on your opinion about the method in which 362 was built up as an expert—

The Witness: No, sir, I did not mean it that way. Just as to whether it is included.

The Court: Bear in mind that that rule is (2162) made only for the purpose of keeping answers clear as we go along.

If it is relevant, or thought to be so by counsel for the defendant, he will have the opportunity to go into that.

The Witness: But, sir, I did not mean to go into the first thought I had in mind, but—

The Court: If you have some further explanation you wish to make—

The Witness: On whether the 17 is in there.

The Court: Very well, you may do that now.

The Witness: And the thought, sir, is that when the net—net over-all change in assets is the thing that is in there, it is very difficult to say that just one item of assets or liabilities is in there. What is in there is the change in net worth, the entire change in net worth, so—

The Court: Yes, but you see, you were not asked whether it was in a change of net worth. You have

a series of schedules here that have certain figures on them and you were asked whether one item was included in another.

The Witness: Yes.

The Court: And you answered that it was. Go ahead.

(2163) The Witness: I hated to say no—

The Court: Now, all right, Mr. Sweeney.

The Witness: —that it is not.

Q. Mr. Sweeney, that figure of $202,000, taken from Government's Exhibit 362, is in turn carried over to your schedule III, is it not? A. It is.

Q. And it is shown in the receipts part of your schedule? A. Yes.

Q. III, is that correct? A. Yes.

Q. It is not shown in the disbursements side? A. Yes, it—it is correctly shown on the receipts side.

Q. It is not shown on the disbursements side? That is all I asked you. A. Oh, the disbursements are shown in the Government's exhibit—

The Court: No, you were asked a question, Mr. Sweeney.

The Witness: Well,—

The Court: —whether the $17,000 item was shown on the disbursements side. Now, the answer to that is, it is or it is not, on your schedule, III.

The Witness: The answer is no.

The Court: Very well. You see, we make much better progress if you go along that way, and any explanation that need to be made will be brought out. (2164) I am sure.

Q. Now, Mr. Sweeney, I show you Government's Exhibit 153, which was the compilation of the investment of Frank

Costello in the Louisiana Mint Company prepared by Mr. Charles B. Murphy, the accountant for that company? A. Yes.

Q. And under the figure 1945 is shown a figure of $23,261.40 as the capital account of the defendant on November 30, 1945, is that correct? A. That is correct.

Q. And then underneath that is shown, "Less drawings December '45 per books, $5,625," is that correct? A. That is correct. That is the way it is shown.

Q. And then the latter figure is deducted from the former and you reach an amount of $17,636.40, is that correct? A. Correct.

Q. And that represents the defendant Costello's capital account in the Louisiana Mint Company after making allowance for drawings during December, so that that shows the capital account at the end of December 1945? A. Which figure, sir?

Q. The $17,636.40. A. I would say not, no.

Q. Well, it represents the capital account as it appears at November 30, 1945, less the drawings to the end of '45, is that correct?

(2165) That, I believe, can be answered yes or no, sir.

The Court: Is there any doubt that that is the figure that appears on the exhibit that was introduced through Mr. Murphy, the accountant?

The Witness: No doubt about that, sir. That is the figure that appears on the exhibit introduced by Mr. Murphy.

The Court: Isn't that the question Mr. Pierpoint asked you?

Q. Now, Mr. Sweeney, assuming, as you did, that there was no original investment in the Louisiana Mint Company by the defendant Costello, you said you showed no

disbursements for any original investment? A. Yes, because the—

Q. Isn't it a fact that that figure represents earnings accumulated in Costello's capital account in Louisiana Mint Company? A. That is the—

Q. Isn't that a fact? A. In part. In part.

Q. You say "In part"? A. Yes. Doesn't include all of the earnings.

Q. But it represents earnings, is that correct? A. It represents earnings down to a certain date, yes.

Q. Does it represent—

(2166) The Court: Does it represent earnings and anything else?

The Witness: It represents—it is—I am—

The Court: Now, Mr. Sweeney, that is a perfectly simple question.

The Witness: Only thing, I am confused.

The Court: Does that represent anything else but earnings?

The Witness: As of what date, sir?

The Court: As of the date that it is dated. It is not a question of whether it represents all the earnings. The question is, does it represent anything but earnings?

The Witness: Only earnings.

The Court: That was the question.

Now, it is 4.30 and we will adjourn until 10.30 tomorrow morning.

Now, ladies and gentlemen, remember the instructions I have given you: Don't try to pull this case together in your own minds yet; don't think about it; don't talk about it among yourselves; and don't go looking in the newspapers for any testimony or

evidence. You get that from the witnesses and exhibits and nowhere else.

Keep your minds completely open until the case is submitted to you, if it is, under the instructions (2166-A) of the Court.

10.30 tomorrow morning.

(Adjourned to May 11, 1954, at 10.30 a.m.)

(2167) New York, May 11, 1954, 10.30 a.m.

(Trial resumed)

(Jury in box)

The Clerk: If there are any witnesses present in the court room at this time they will please retire to the witness room.

ALFRED E. SWEENEY, resumed.

Cross Examination by Mr. Pierpoint (Continued):

Q. Now, Mr. Sweeney, do you have Defendant's Exhibit III there? A. No, sir.

Q. And how about Government's Exhibit 362? A. I am sorry, I don't have a copy.

Mr. Fennelly: Here is 362.

Q. Now, Mr. Sweeney, last evening when we adjourned we were talking about Louisiana Mint Company. A. Yes.

Q. And we had located on Government's Exhibit 362, as

Alfred E. Saxonis—for Defendant—Cross

part of the assets on hand on December 31, 1945, an item of $17,636.40 for Louisiana Mint Company, is that right? (2168) A. As shown by Exhibit 362.

Q. That is correct. A. Yes.

Q. Then we had looked at Government's Exhibit 153, which was a schedule made up by the accountant for the Louisiana Mint Company, Mr. Charles B. Murphy, and we had found an item of $17,636.40 on that schedule; is that correct? A. That figure shows after—

Q. It is on the schedule; is that correct? A. After subtracting drawings, yes.

Q. And we had decided that, since there was no original capital investment in the Louisiana Mint Company, we had decided that that figure represented earnings left in the business, is that correct? A. Well, there is a dispute on the drawings of $5,625.

Q. We decided that the figure of $17,636.40 had represented earnings left in the business? A. Well, I don't agree with that.

Q. You don't agree with the schedule drawn up by the Louisiana Mint Company's accountant? A. No, no, for two reasons.

Q. Let us assume for the moment that the schedule drawn up by the accountant is correct, and if the schedule were correct then that figure of $17,636.40 (2169) would represent accumulated earnings, is that correct? A. No, sir.

Q. I say, assuming that schedule were correct. A. Assuming it was correct, this figure would not represent what you say.

Q. Well, there wasn't any original investment, is that correct? A. I agree on that, yes.

Q. And this figure of $17,636.40 is arrived at by taking the capital account at the end of the fiscal year 1945, that is, November 30, 1945? A. Yes.

Q. And subtracting from it some drawings, is that correct? A. That is what this exhibit shows, yes.

Q. And this figure, the balance in the capital account at November 30, 1945, $23,261.40, would you agree that that figure represents accumulated earnings? A. Well, I have no quarrel with that figure, that is right, that is accumulated earnings, yes.

Q. What is deducted from it is drawings, is that correct? A. That is correct.

Q. So what is left is accumulated earnings, is that correct? A. Only as shown by this exhibit, because—

Q. I said assuming that the exhibit is correct. A. Assuming it is correct, you are correct.

(2170) Q. I am correct, then, that this figure of $17,636.40 is accumulated earnings, is that correct? A. Accumulated earnings to that point.

Q. All right. But that is what it represents as accumulated earnings? A. What the earnings to that December—

Q. That is not what I asked you, Mr. Sweeney. A. Excuse me.

Q. Would you answer the question? Does that figure of $17,636.40 represent accumulated earnings? Yes or no. Assuming that the schedule is correct. A. If you just add to what they—

Q. Would you answer the question yes or no? A. I can't answer it.

The Court: He says he can't answer it unless you fix a date for it.

Q. Well, we will go through it again, Mr. Sweeney. The balance in the capital account at the end of November, 1945—

The Court: Is it necessary to do that, Mr. Pier-

point, or is it possible for you to fix a date on which the witness can agree with you?

Mr. Fennelly: May I just look at an exhibit, your Honor?

The Court: You may.

(2171) (A pause)

Mr. Fennelly: The question Mr. Pierpoint is asking from the exhibit I object to because he is not stating what the exhibit shows.

Mr. Pierpoint: May I continue, your Honor?

Q. We have a figure here of $23,261.40, which you agree represents accumulated earnings at the end of the fiscal year November 30, 1945. A. Yes, sir.

Q. You agree to that? A. Yes, I agree with that, yes.

Q. Then we take something away from that. A. That is correct.

Q. And the result, since we haven't added anything, must be accumulated earnings, isn't that correct? A. No, sir.

Q. That is not correct? A. That is my position.

Q. What does it have in there other than accumulated earnings? A. It has drawings deducted which—

Q. I asked you what it had in there, what was added to it other than accumulated earnings? All we did was subtract something from that. A. Well, that subtraction has a big bearing on what the accumulation is.

The Court: The question is, having made the (2172) subtraction, is there anything left in whatever is left that is not accumulated earnings? I understand your answer to be that it is not all accumulated earnings. Now, the question is what remains in there other than accumulated earnings?

The Witness: I would say that on the basis the figure as subtracted does represent a portion of the accumulated earnings, yes, sir.

The Court: That is what was subtracted.

The Witness: Yes.

The Court: But the question is directed to the remainder. What does the remainder constitute beside accumulated earnings?

The Witness: It constitutes accumulated earnings.

The Court: And anything else but accumulated earnings?

The Witness: No, there is nothing more in it.

The Court: All right. Then it is correct to say that whatever is left, after substraction, constitutes only accumulated earnings?

The Witness: Correct, sir.

The Court: All right. Now, get along from there.

Q. Now, Mr. Sweeney, all the earnings from Louisiana Mint Company should have been reported on Costello's tax returns, is that correct? (2173) A. His distributive share to November 30, yes.

Q. That is correct? A. Yes.

Q. Turning now to Defendant's Exhibit III and looking at the part of this exhibit which is supposed to indicate receipts, I notice that you have an item here, gross tax return income of Frank Costello, $269,516.87. A. That is correct.

Q. That is under the item of receipts. A. That is correct, yes.

Q. And that would include all, then, of the earnings from Louisiana Mint Company that were reported on Costello's tax returns, is that correct? A. That is correct.

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Q. So you have that in there as an item of receipts. A. That is correct, yes.

Q. Going back to Government's Exhibit 358, this figure of $17,636.40, you say consists of accumulated earnings, is that correct? A. Which figure?

Q. This figure of $17,636.40 represents accumulated earnings, is that correct? A. Accumulated earnings and —

Q. You just said a little while ago that it did, Mr. Sweeney. A. But now the date becomes important (2174) again.

The Court: All right.

Q. Would it represent—as a matter of fact, isn't it a fact it would represent earnings accumulated prior to November 30, 1945? A. No, sir.

Q. They would have been accumulated subsequently to that time? I am referring now to this figure of $17,636.40. A. That is it. I—

Q. They are or they are not earnings accumulated prior to that date?

The Court: Just a minute, please. Just a minute, now. I am afraid we are losing time here because you asked the witness a question, and when he starts to answer it you amplify the question or add to it or something else.

Mr. Pierpoint: I am sorry.

The Court: That is a little confusing to all of us. Just ask the question and let the witness answer it. Give the witness an opportunity to answer it.

Mr. Pierpoint: I will retrain the question, your Honor.

Q. Isn't it a fact that that figure of $17,636.40 represents earnings accumulated prior to November 30, 1945,

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and I think the question is susceptible to a (2175) yes or no answer. A. I don't know whether you mean the total or not.

Q. I mean the figure of $17,636.40. A. Does not represent the total earnings accumulated—

Q. Doesn't it? That is not the question I asked. Doesn't it?

The Court: Now, Mr. Witness—

The Witness: Yes, sir.

The Court: —you are being given the fullest opportunity to make the fullest answer you think responsive to a question.

The Witness: Yes, sir.

The Court: And any time you think that you have been prevented from making a full answer, you let me know and you will make it, but I tell you now that I think you are not answering the questions responsively, this last question, and I advise you that that is not the first time I have observed it.

I direct you, sir, please, to do the very best you can in making a responsive answer to the question. If you think that the question and the answer together give an inaccurate picture of what you believe to be the fact, I say you may add to it.

The Witness: Thank you.

The Court: But we will get nowhere with this (2176) constant sliding off from one question to answering something which hasn't been asked, and I direct you to stop it.

Proceed. Will the reporter read the question that the witness was asked and which I have just ruled he didn't answer?

(Question read as follows:

Alfred E. Sweeney—for Defendant—Cross:

"Q. Isn't it a fact that that figure of $17,636.40 represents earnings accumulated prior to, November 30, 1945?")

The Court: You weren't asked whether it represented all. You were asked merely whether it represented accumulated earnings, and as I recall the beginning of your answer you said: "Well, it doesn't represent all of them."

The Witness: Yes.

The Court: You will answer whether or not it represents accumulated earnings. Tell us whether it does or doesn't.

The Witness: Yes, sir, it represents accumulated earnings after subtracting the drawings—

The Court: Does it represent accumulated earnings as of November 30, 1945

The Witness: No, sir, because drawings have been subtracted since that date.

(2177) The Court: Very well. You say it doesn't represent accumulated earnings as of that date. Do you mean that it doesn't represent all of the accumulated earnings on that date?

The Witness: Of the— Yes, sir, that is what I meant.

The Court: Very well.

Q. But isn't it a fact, Mr. Sweeney, that there is nothing in it but earnings accumulated as of that date regardless of whether something else has been taken out? A. In the 17,000 figure?

Q. $17,636.40. A. That would be correct.

The Court: I thought that is what you said a few minutes ago.

Mr. Pierpoint: Yes, sir; that is what I thought, too.

The Court: Very well.

Q. Since all of the earnings reported on those tax returns is included in this item on Defendant's Exhibit III as a receipt, this item of $17,636.40 is also included as a receipt on Defendant's Exhibit III, isn't that correct? A. I would say not.

Q. Now, Mr. Sweeney, you told us that all of that (2178) figure of $17,000-odd was earnings and you told us that Costello should have reported his earnings from Louisiana Mint Company on his tax returns. A. That is correct.

Q. And what is reported on his tax return is in here under receipts. A. That is correct.

Q. So isn't it a fact that the $17,000-odd figure is in there under receipts? A. Is in—

Q. I think that is susceptible of a yes or no answer, too. A. It is in there but there is an adjustment.

Q. But it is in there? A. Yes.

Q. Mr. Sweeney, will you show me where it is taken out, that $17,636.40, will you show me where that is taken out in disbursements? A. It is in Defendant's Exhibit III. It is not taken out as disbursements.

The Court: I don't hear you.

The Witness: It is not taken out.

The Court: It is not taken out?

The Witness: Yes, sir.

The Court: Very well.

Q. As a matter of fact, it is still in Louisiana Mint Company, is it not? A. Oh, yes.

Q. So it is in receipts and it is in Louisiana (2179) Mint Company but it is not taken out of the Defendant's Exhibit III as a disbursement? A. It is—

Q. I think that is susceptible of a yes or no answer, too.

The Court: Again, sir—

Q. A double question.

The Court: —rephrasing what the witness has already said. You got your answer once. Now you are asking it again.

The Witness: It is like—

Mr. Pierpoint: I withdraw the question.

The Witness: There is a slight difference—oh, excuse me, your Honor.

Q. Mr. Sweeney, referring to Defendant's Exhibit III, have you got a piece of paper there? A. Yes.

Q. Under disbursements you have a number of figures here for investments and loans to the Crescent Music Company. You have one here in 1943. What I would like you to do, Mr. Sweeney, is to take those figures and add them up for me, the figures you show as investments and loans to Crescent Music Company.

What total do you come to, Mr. Sweeney? A. I have $27,474.17.

Q. That agrees with my figures.

(2180) Mr. MacMahon: We can't hear back here.

The Witness: A total of $27,474.17.

Q. That constitutes the figure shown as disbursements on Defendant's Exhibit III. A. Correct, yes.

Q. Now, would you take Government's Exhibit 362. A. Right.

Q. And would you refer to the schedule showing investments, which is schedule B, and under date of December 31, 1945, there is a figure in there opposite Crescent Music

Company, is there not, of $27,891.91? A. That is correct.

Q. Now, would you write that down? And now, Mr. Sweeney, I show you Government's Exhibit 137, which is the schedule of the investment in Crescent Music Company, drawn up by Mr. Charles B. Murphy, the accountant for that company, and I refer you, under the year 1945 to the figure of $35,891.91; do you see that? A. Yes, sir.

Q. And that is the balance in Mrs. Costello's capital account on August 31, 1945? A. That is correct.

Q. And then underneath that there is a subtraction of 8,000 representing drawings in September through (2181) December of 1945, is that correct? A. That is correct.

Q. Giving a result of $27,891.91, is that right? A. That is correct.

Q. Now, isn't it a fact, Mr. Sweeney, that that figure of 27,000—and that is the figure that appeared on Government's Exhibit 362—362-B, that you wrote down there, $27,891.91? A. That is correct.

Q. Now, will you take the figure that you got from adding up the investments and loans to Crescent and subtract it from that figure? A. A difference of $417.74.

Q. And isn't it a fact, Mr. Sweeney, that that difference of $417.74 consists of earnings accumulated in Crescent Music Company prior to the end of December, 1945? I believe that is susceptible of a yes or no answer. A. I would have to say no.

Q. It doesn't? What else does it consist of? A. Prior to December, if that includes up to December there were additional earnings down to the end of the year.

Q. But, Mr. Sweeney, the question I asked you, and again I don't believe you are being responsive, (2182) and again I ask you, does it consist of anything other than earnings accumulated prior to December 31, 1945? This is the same problem we had with Louisiana Mint, and I believe, Mr.

Sweeney, the answer is the same. A. Would you repeat the question once more, please?

The Court: You arrived at the figure of $417, isn't it

The Witness: Yes.

The Court: —and some odd cents.

The Witness: Yes, sir.

The Court: Now tell us what it is, what does that figure represent?

The Witness: Yes, sir. That represents the accumulated earnings not drawn from Crescent Music before considering additional earnings down to December 31, 1945.

Q. So that it does represent accumulated earnings, Mr. Sweeney? A. Yes.

The Court: Isn't that what you were asked before we got into this detour here?

The Witness: I assume the question implied to the end of the year, your Honor. That is the only point of distinction.

The Court: All right. Well, hereafter, then, (2183) and this is merely as a guide so that we can save time, when the question, any question, hereafter is unclear, before you start to answer will you state that it is unclear and ask the questioner to clarify it?

That may save us a little bit of time.

The Witness: Fine. Thank you, sir.

Q. Now, Mr. Sweeney, referring to Defendant's Exhibit HH, you have as a receipt, an item income of Loretta Costello, is that correct? A. That is correct.

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Q. And that is taken from her tax returns, is that correct? A. That is correct.

Q. And that would include all her earnings from Crescent, whether accumulated or not; is that correct? A. Would you clarify "whether accumulated or not"?

Q. Well, isn't it a fact that Mrs. Costello is required to report her earnings from Crescent Music Company whether she receives them or not? A. That is correct.

Q. So that figure would include $417.74, is that correct? A. That is correct.

Q. Now, Mr. Sweeney, would you show me where on the disbursement side you have shown that figure as a disbursement? A. There is nothing on the disbursement side.

(2184) Q. Then as a matter of fact, it is left in the Crescent Music Company as shown by Government's Exhibit 153, isn't that correct? A. Yes, sir, but there is an adjustment.

Q. Now, Mr. Sweeney, referring to Defendant's Exhibit HH, on the receipt side you have an item Return of Capital Investment in Philip Kastel Partnership, $9,500, is that correct? A. Yes.

Q. And then underneath that you have Return of Capital Investment; another return of capital investment in Philip Kastel Partnership, of $5,500, is that correct? A. Correct.

Q. And you base that second item of $5,500 on the fact that Costello said in 1939 that he had advanced 15,000 to get into that partnership; is that correct? A. That is correct, yes.

Q. Now, Mr. Sweeney, I show you Government's Exhibit 23, which is the statement made by Costello in 1937, two years prior to 1939, and isn't it a fact that Costello, when asked the question, "Did you have to put up any cash or any other consideration in this partnership?" referring to the Philip Kastel partnership, answered "Yes, I believe

I advanced him about $9,500, between nine and ten thousand." isn't (2185) that correct? A. That is correct.

Q. And that statement was made in 1937? A. That is correct.

Q. Now, Mr. Sweeney, were you here during the testimony of Mr. Matheny, the agent from Jackson, Mississippi? A. I was.

Q. Do you recall that he testified that he had seen the books of Bayou Novelty Company and that all of the original investment in Bayou Novelty Company was returned by April of 1937? A. I remember the—

Q. Do you recall that he so testified? A. Yes. I don't remember the date, but I remember the testimony that it was returned, yes.

Q. So that the only reason you are including any item here is on your guess that Kastel didn't return that money to Costello until after October 18, 1937? A. No.

Q. Now, I believe you testified yesterday, Mr. Sweeney, again looking at Defendant's Exhibit III, I believe you testified on direct examination that this figure which you came to down at the bottom, cash balance $84,044.27, includes cash in the bank, is that correct? (2186) A. Yes, sir, yes, sir.

Q. That is correct? A. That includes cash in the bank.

Q. When you refer to cash balance—

The Court: What item is that?

Mr. Pierpoint: That is the final item on the schedule, your Honor, cash balance.

The Court: Yes.

Q. So that on these schedules, when you say cash balance you mean to include cash in the banks, is that correct? A. Yes.

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The Court: Do you also mean something besides cash in bank?

The Witness: Yes, sir.

The Court: Very well.

Q. Now, isn't it a fact, Mr. Sweeney, that that figure of $84,044.27 also includes this $27,200 that you said was in sort of an escrow account? A. No, sir.

The Court: Well, does it or doesn't it include it?

The Witness: I was just thinking for a moment, sir.

The Court: Well, look over the schedule now and tell us whether it does or not.

The Witness: It does not. It does not.

(2187) The Court: It does not?

The Witness: That is right.

Q. Now, Mr. Sweeney, I think you testified yesterday that the figure of $27,200 did appear on the receipts side of your schedule within this figure of $202,865.81, and I think you further testified that you didn't take it out any where on the disbursement side. A. Excuse me.

Q. So isn't it a fact that $27,200, which you described as being in sort of an escrow account, does appear in the $84,000? A. No, sir, my recollection is different; my recollection is that I testified that it appeared on Government's Exhibit 362.

The Court: From which you got the figure of 202,000.

The Witness: And the computation leading down to 202,000.

The Court: Yes. But did we not agree, or did you not agree yesterday that on 362, Government's Exhibit 362, the figure of 202,000 included the 27,200?

The Witness: I agree on 362, sir.

The Court: Yes.

The Witness: Yes.

(2188) The Court: Now, when that precise figure is taken over and put on III, isn't that a fact that the 27,200 still remains a part of that 202,000?

The Witness: Sir, the answer turns on the point as to what—

Mr. Fennelly: May I at this point read to your Honor what Mr. MacMahon told you about the 202,000 in response to a question?

The Court: You may.

Mr. MacMahon: Is this something that took place in the absence of the jury or is it—

Mr. Fennelly: I think it took place before your Honor. But I think your Honor ought to know about it. He told your Honor—

The Court: Well, just a minute. If it was something that occurred outside the presence of the jury, Mr. Fennelly, I am surprised that you would attempt to read it to me before the jury.

Mr. Fennelly: May I bring it up to you?

The Court: I direct you not to do it. You may direct me to the page.

Mr. Fennelly: I would like your Honor to read the bottom of page 1906.

The Court: I will do it.

Mr. Fennelly: And the top of page 1907 of (2189) the typewritten minutes.

The Court: 1906 and 1907.

Mr. Fennelly: 1906 on the bottom, and the top of the other.

(A pause)